Nos. 79-1429 and 79-1583

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL.,
Petitioners,
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.,
Respondents.

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE OF UNION RESPONDENTS TO SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENT

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Two months after the argument in these cases, the Secretary of Labor has come to this Court with the

suggestions: that "the Court may wish to refrain from further consideration of the issues now before it in the pending cases" (Supp. Mem. at 4); and, in addition, "that it would be appropriate for the Court to vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development" (*ibid.*). The interim development that is the occasion for those suggestions is the Secretary's announcement that he has issued an "advance notice of a proposed rulemaking" to "evaluate the feasibility and utility of cost-benefit analysis in the standard setting process, to compare the costs and benefits of the current standard and various alternatives, and to reassess the current standard in light of the findings." (*Id.* at 2).

For the reasons that follow, while we do not object to the Secretary's motion for leave to file the memorandum, we submit that the suggestions contained therein should be rejected.

The supplemental memorandum maintains a studied silence as to what questions of law are before the Court and as to the bearing of those questions on the proposed additional rulemaking proceedings. We submit that in this case, as in *Industrial Union Department* v. *American Petroleum Institute*, —— U.S. ——, 44 USLW 5022 (July 2, 1980), a central issue is whether the Congress itself has set a balance between costs and benefits thereby precluding the Secretary from making his own cost benefit evaluation based on the results of a rulemaking proceeding.[1]

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[1] While we discuss the implications of that issue with respect to the Secretary's suggestions, we do wish to note another point. It is common ground, we suppose, that a final standard on exposure to cotton dust has been issued, that the standard imposes obliga-

That question of law is not one that depends on the view of any particular administration.[2] Rather, the question turns solely on the meaning of the Act and the intent of the Congress that passed that Act. What the Secretary proposes to do on remand can in no way advance the resolution of that inquiry. And to postpone that inquiry, as the Secretary suggests, could well lead to wasted administrative resources and to additional,

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tions on employers in the cotton manufacturing industry and provides benefits to employees in that industry, that the manufacturers have challenged that standard, and that unless they prevail in this Court, or until the Secretary through the procedures mandated by the Administrative Procedures Act modifies or revokes that standard, it continues in effect. And we assume that the Secretary in accord with his obligations has not, in issuing the advance notice of a proposed rulemaking, prejudged any of the issues to be considered in the proposed proceedings. Nor, of course, has the Secretary bound himself to conclude that proceeding at any given time. Thus, the notice simply means that at some point in the future the Secretary may or may not modify the present standard. We therefore submit that the notice is not an interim development that warrants further postponing a judicial decision of the legality of a health standard which was first noticed for proposed rulemaking over six years ago. In this circumstance, of course, a decision by this Court would not be an "advisory opinion" as intimated by the Secretary; unlike *EPA* v. *Brown*, 431 U.S. 99 (referenced by a "Cf." signal at Supp. Mem. 4), the Secretary has neither withdrawn all or part of the challenged regulation nor confessed error on any part of the merits. On the contrary, as we develop in the text, the very institution of the proposed new rulemaking assumes a particular answer to the issue now before the Court in a live case and controversy between the petitioner manufacturers and the respondents Secretary and Unions.

[2] Executive Order 12991 (February 17, 1981), on which the Secretary bases his request for a remand to undertake a cost-benefit analysis, itself recognizes, at § 2, that the executive only has the authority to conduct a cost-benefit analysis "to the extent permitted by law."

lengthy delays[3] without serving the legitimate interests of any party.

The decision of the District of Columbia Circuit now on review focuses the issue we have just defined:

> In the OSH Act . . . Congress itself struck the balance between costs and benefits in the mandate to the agency. Section 6(b)(5) unequivocally mandates OSHA to
>
> > set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity.
>
> Thus Congress concluded that the benefits of health protection warranted the expense of an effective standard.

Pet. App. 72, (footnotes omitted); see also Pet. App. 74.[4]

To the same effect, in his brief on the merits in this Court, the Secretary advised that:

> A cost-benefit test is inconsistent with the language and legislative history of Section 6(b)(5)
>
> * * * *
>
> The pattern and structure of the Act as a whole also demonstrate that Congress did not intend health protection in this area to depend on an individualized

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[3] Proceedings in this case, commencing with OSHA's publication of an Advanced Notice of Proposed Rulemaking (36 Fed. Reg. 44769), have already consumed more than six years.

[4] Implicit in the Secretary's request that the judgment of the court of appeals be vacated is a recognition that that court's interpretation of the Act forecloses the approach on remand the Secretary proposes to take.

> balancing of costs and benefits with respect to every standard.
>
> * * * *
>
> Congress carefully considered and limited the role that cost considerations should play here, a role that does not include the lowering of feasible standards.

Brief for the Federal Respondent at 39, 41, 46, 47. See also Brief for Union Respondents at 23-40.

In sum this case squarely presents the issue reserved in the plurality opinion in *Industrial Union Department* but treated by the four dissenting Justices in that case as follows (48 USLW at 5051, 5052):

> [T]he legislative history of the feasibility requirement [of § 6(b)(5)] demonstrates that Congress' sole concern was that standards be economically and technologically achievable.
>
> * * * *
>
> [To apply a cost-benefit analysis] would render [§ 6(b)(5)] internally inconsistent by reading into the term feasible a requirement irreconcilable with the express language authorizing the Secretary to set standards assuring that "no employee will suffer material impairment . . . ."

Were this Court, in deciding the instant case, to adopt the interpretation of the Act advanced by the court below, by the Secretary and the Union respondents in their respective briefs on the merits, and by the four dissenting justices in *Industrial Union Department*, the inquiry upon which the Secretary proposes to embark would be precluded by the Act. On the other hand, were this Court to adopt in this case an interpretation of the Act that permits the Secretary to conduct such an inquiry, then the rulemaking proceedings proposed by the Secretary would go forward in the light of this Court's resolution of the statutory question; whatever limitations or guidelines this Court might determine apply to a cost-

benefit analysis under the Act would govern those proceedings. Postponement of this Court's decision would therefore result either in a wholly wasted rulemaking proceeding or in a proceeding that takes place in the context of uncertainty and continuing disagreement as to the governing statutory principles.

CONCLUSION

For the foregoing reasons, the suggestions put forth by the Secretary in his Supplemental Memorandum should be rejected.

Respectfully submitted,

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